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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, *Appellant*,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee*.

No. 286 [illegible] 2

ORGANIZED VILLAGE OF KAKE, *Appellant*,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee*.

ANGOON COMMUNITY ASSOCIATION, *Appellant*,

v.

WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee*.

No. 287 [illegible] 3

On Appeal from the District Court for the State of Alaska

MOTION TO AFFIRM OR DISMISS
and
BRIEF OF APPELLEE

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METLAKATLA INDIAN COMMUNITY, ANNETTE ISLAND RESERVE, a Federally Chartered Corporation, *Appellant*, v. WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee*.	No. 326
ORGANIZED VILLAGE OF KAKE, *Appellant*, v. WILLIAM A. EGAN, Governor of the State of Alaska, *Appellee*.	No. 327
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On Appeal from the District Court for the State of Alaska

MOTION TO AFFIRM OR DISMISS

Appellee [pursuant to Supreme Court Rule 16 1(c)] moves the Court to affirm the judgment sought to be reviewed on appeal, on the ground that if any questions remain which are not moot, the same are so unsubstantial as not to need further argument. (The

question whether the district court in Alaska is a federal court within the meaning of Rule 16 1(c) has not been subjected to judicial determination.)

Appellee moves the Court, pursuant to Rule 16 1(b), in the alternative, to dismiss the appeal herein on the ground that it does not present a substantial federal question.

Dated at Juneau, Alaska, this 16th day of September, 1959.

Respectfully submitted,

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IN THE

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On Appeal from the District Court for the State of Alaska

BRIEF OF APPELLEE

ORGANIZATION OF BRIEF AND QUESTIONS PRESENTED BY APPELLANTS

The appellants Kake and Angoon raise four questions in their printed brief. The appellant Metlakatla raises seven, the first four of which are identical to those raised by Kake and Angoon. (Kake-Angoon

brief, 4 and 5; Metlakatla brief, 4 and 5.) The four questions common to both printed briefs which are identically presented, even to numbering, paraphrased are:

1. Does § 6(e) of the Alaska Statehood Act, 72 Stat. 339, containing what is commonly known as the Westland proviso, reserve for the calendar year 1959 complete control of Alaska fisheries in the Secretary of the Interior notwithstanding Alaskan constitutional provisions and state statutory criminal law to the contrary?

2. If the Secretary of the Interior does have exclusive control, is § 6(e) of the Statehood Act (Westland proviso) in violation of the "equal footing" doctrine governing the admission of new states?

3. (a) Do § 4 of the Statehood Act and Art. XII, § 12, of the Alaska Constitution comprehend a permanent disclaimer by the State over any control whatsoever of Indians fishing in state waters, and

(b) Do these sections affirmatively grant authority to the Secretary of the Interior to exclude appellants from the operation of state constitutional provisions (Ordinance 3) and general criminal statutes relating to fish traps?

4. If the disclaimer (in Question 3) is interpreted as valid authority for the Secretary of the Interior to authorize fish traps in violation of the State Constitution (Ordinance 3), does the same violate the "equal footing" doctrine governing the admission of states?

Metlakatla, in its brief, presents three additional questions, which are:

5. Did the Statehood Act, by its conveyance of tidelands and submerged lands to the State, destroy or restrict the exclusive right of fishery purportedly established by a presidential proclamation for the Metlakatla Indians?

6. Does the Secretary of the Interior have the authority under the White Act (48 U.S.C., § 221) to grant a discriminatory fishing privilege to Indians, or, in the alternative, does he have such authority pursuant to the Act of Congress creating the Annette Island Metlakatla Reserve (48 U.S.C., § 358) and the subsequent presidential proclamation?

7. Did the lower court err in holding that waters surrounding the Metlakatla reservation are not "Indian country" and therefore subject to all state criminal laws?

STATEMENT OF THE CASE

None of the appellants claim aboriginal, historical, or treaty rights. The Metlakatlans immigrated from Canada in the year 1887 and have used traps intermittently since 1915 (Metlakatla, 7). Kake and Angoon got into the fish-trap business in 1948 when they purchased a cannery from private interests. The fish traps used by all of the appellants have been used only at such times as the same have been authorized by the Secretary of the Interior under *general fishing regulations* applicable to the whole of Alaska, promulgated pursuant to the authority of the White Act and similar fisheries legislation "for the purpose of protecting and conserving the fisheries." [§ 1, 43 Stat. 464; 48 U.S.C., §§ 221-224 (White Act).] Pursuant to § 1 of the White Act (48 U.S.C., § 222), Indians composing the appellant communities, whites and half-bloods competing for a limited number of fish have been consist-

ently treated with equality, with no special privilege being given to appellants as communities or to their inhabitants as individuals. Historically, all have been treated equal—natives and whites. The first discrimination occurred in 1959 and is the source of this litigation. It is important to understand that as a factual matter this litigation does not involve fishing by individual Indians for personal use and consumption, but rather, the rights here involved are those connected with million-dollar commercial enterprises.

Ordinance 3 of the Constitution of the State of Alaska provides:

> "As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited in all the coastal waters of the State."

This is existing law binding on the Secretary of the Interior, *Ketchikan Packing Company, et al.* v. *Fred A. Seaton, Secretary of the Interior, et al.,* (May 14, 1959) 267 F. 2d 660.

SUMMARY OF ARGUMENT

The real issues of this litigation are moot.

The chain of authority for the claim of appellants in its present posture is as follows:

1. Regulations issued by the Secretary of the Interior permitted them to fish certain fish traps for the year 1959.

2. The direct authority for the regulations was the White Act.

3. The White Act was made applicable to Alaska after statehood by the Westland proviso.

4. Pursuant to the terms of the Westland proviso, it will expire January 1, 1960.

5. The 1959 fishing season has terminated and, therefore, all issues of interpretation, constitutionality, and rights concerning the Westland proviso, the White Act, and the regulations of the Secretary pursuant to the same are moot.

Section 4 of the Statehood Act is not the basis for a present claim to a federal right by appellants, but may possibly be the basis for a future claim. The same is true of the special statute pertaining to Metlakatla, creating their reservation, and the presidential proclamation pertaining to surrounding waters. At this time, a pronouncement as to § 4 and the special Metlakatlan statute and proclamation is unnecessary and speculative inasmuch as the rights claimed by appellants in this case had as their source the White Act and the Westland proviso, which are moot.

The injunctive relief sought by appellants is no longer necessary for the 1959 season, as the appellants did, in fact, fish their traps, and no parties involved in the litigation can claim damages against the other.

The basic problems, constitutional and otherwise, concerning fish traps and state/federal relationships, are of great importance and, therefore, should not be decided on moot or speculative issues. All issues, both moot and speculative, involves serious state and federal constitutional problems which should be avoided until squarely presented to this Court in a justiciable controversy.

ARGUMENT

I.

SECTION 6(e) OF THE ALASKA STATEHOOD ACT (WESTLAND PROVISO) AND THE WHITE ACT ARE THE AUTHORITY USED BY THE SECRETARY OF THE INTERIOR IN PROMULGATING THE REGULATIONS UNDER WHICH APPELLANTS OPERATED THEIR FISH TRAPS. ALL QUESTIONS PERTAINING TO THIS PROVISO ARE NOW MOOT. THE REGULATIONS APPLY ONLY TO THE CALENDAR YEAR 1959; THE PROVISO WILL HAVE NO EFFECT BEYOND JANUARY 1, 1960; AND THE FISHING SEASON IS OVER FOR 1959.

For many years the fisheries of Alaska have been administered by the Secretary of the Interior pursuant to the authority granted by what is popularly known as the White Act (48 U.S.C., § 220, et seq.). The Territory never had a grant of authority from Congress to manage and administer its own fisheries. In furtherance of the purposes of the White Act of "protecting and conserving" (48 U.S.C., § 221), the Secretary of the Interior has from time to time issued regulations closing certain areas to fishing, prohibiting fishing during certain periods, and limiting the size, amount and nature of gear to be used in the taking of fish, etc. The White Act expressly prohibits any exclusive right of fishery or any discrimination as among citizens engaging in the fishery. (See 48 U.S.C., § 222.) The Secretary can discriminate as between different types of gear to be used, traps versus set nets versus seines, etc. (See *Dow* v. *Ickes,* 123 F. 2d 909.) However, the fishery was to be available to all, and no provision was to be made for discrimination among persons. (See *Hynes* v. *Grimes Packing Co.,* 337 U.S. 86, 93 L. ed. 1231, 69 S. Ct. 968 (1949).) The appellants historically have not been subject to treatment under the regulations of the Secretary of the Interior different from the treatment accorded other fishermen or fishing communities in Alaska.

During the congressional debate on the Alaska Statehood Bill, considerable concern was expressed as to the ability of Alaska to police and manage its fisheries, primarily because it had historically never been permitted to engage in this activity and, therefore, was relatively unprepared in legislation, equipment, and personnel. As a result, when the Statehood Bill was finally enacted, § 6(e) of 72 Stat. 339 provided for the transfer to Alaska of properties and equipment heretofore used by the Federal Government in the regulation of fisheries. The "Westland proviso" was added to § 6(e), stating that the "administration and management" of Alaska's fisheries shall be retained by the Federal Government under existing laws until after the Secretary of the Interior has certified that the Alaska Legislature has made adequate provision for the administration, management, and conservation of said fisheries "in the broad national interest." As observed by appellants, "The time limit therein expressed has been since defined, and federal control will cease January 1, 1960." (Kake-Angoon, 11; Metlakatla, 13.) The Westland proviso (if constitutional—a point which need not be passed upon, since it is moot) continued in the Secretary of the Interior the authority for the year 1959 that he previously had under the White Act.

Pursuant to the White Act, the Secretary issued his 1959 regulations on March 7, 1959, 24 C.F.R. 2053-2059 (Kake-Angoon, 11; Metlakatla, 13). These regulations (§ 115.26) authorized the appellants to fish with fish traps in certain locations. Pursuant to the Administrative Procedure Act (5 U.S.C., § 1001, et seq.), the authority for a regulation must be given. The Secretary cited the White Act, 48 U.S.C., § 221, and stated

that the reason the White Act applied after statehood, that is for the year 1959, was because of the authority expressed in § 6(e) of the Statehood Act. (Federal Register, Thursday, March 19, 1959, 24 F.R. 2053.) As will be obvious by a casual examination of the regulations of the Secretary for the calendar year 1959, and as practical matter, the fishing season in Alaska for the calendar year 1959 has terminated.

For the same reason that § 6(e) is moot, an interpretation of the White Act, and of the regulations issued for 1959 pursuant to the same, would be unnecessary and would entail useless effort. However, even if the Westland proviso, § 6(e), were not moot, and even if the question of the proper interpretation of the White Act were not moot, the regulations upon which appellants claim a federal right and which are issued for a calendar year only, that is 1959, are moot.

Appellants do not dispute that the regulations promulgated by the Secretary of the Interior which are in question here are merely for the calendar year. This was conceded in the oral argument before Justice Brennan. It is obvious that fishing regulations, the purpose of which is to conserve and protect the fishery, must be altered from year to year as the cycles of salmon runs change. The appellants have observed that the Secretary has always in the past "issued regulations from year to year." (Kake-Angoon, 11; Metlakatla, 13.) As the Secretary observed in 24 F.R. 2053,

> ". . . it has been determined that only eleven of the twenty-one Indian traps can be permitted to operate *during the 1959 season.*" (Emphasis added)

The appellants have fished their traps, rightly or wrongly, for 1959, and we do not believe they are subject to a damage action. Nor, as appellants have observed, is the State subject to a damage action for any delay occasioned by state action in the use of fish traps during the immediate past season. (Kake-Angoon, 7; Metlakatla, 8.)

It is submitted that the foregoing argument shows conclusively that Questions 1 and 2, common to the appellants' briefs, are thoroughly mooted and do not remain substantial federal questions requiring the action of this Court.

II.

SECTION 4 OF THE STATEHOOD ACT NEITHER CREATES NOR DESTROYS ANY FISHING RIGHTS. DOES NOT CONTINUE IN EXISTENCE THE OPERATION OF THE WHITE ACT NOR THE AUTHORITY TO ISSUE REGULATIONS PURSUANT TO THE WHITE ACT, AND ANY RIGHT WHICH THE APPELLANTS MAY HAVE PREDICATED ON THE SAME IS AT THIS TIME SPECULATIVE.

Appellants, in their brief, have failed to distinguish § 6(e) of the Statehood Act, Westland proviso, as a basis for a federal right, from § 4 of the Statehood Act, the negative disclaimer, and have urged both sections indiscriminately as authority for the issuance of regulations by the Secretary of the Interior under which they claim a federal right.

Upon close analysis, as shown in our Argument I, the complete authority, as interpreted by the Secretary of the Interior, for his regulations is § 6(e) of the Statehood Act and the White Act. Section 4 of the Statehood Act, as the legislative history clearly shows, does not purport to either create or extinguish Indian rights, but rather to leave the questionable nature of

the same to judicial or legislative determination. Congress wisely determined that it would not, while occupied with the greater issue of statehood, attempt to determine the right or wrong or even the existence of native rights. The following is a portion of the prepared report on the Statehood Bill, H.R. 7999:

> "Finally the section provides that no attempt will be made to deal with the legal merits of the indigenous rights but to leave the matter in status quo for either future legislative action or judicial determination."
>
> H.R. Report No. 624, 85th Congress, First Session, page 19. (For further analysis on this history, see brief of appellee, lower court, pages 102 to 104 of the transcript prepared by the district court clerk.)

Appellants urge as an interpretative aid that:

> ". . . The fact that the appellants were exercising a fishing right through the use of *fish traps owned by the United States as trustee,*[1] at the time Section 4 was enacted does much to suggest the language of Section 4 was tailored to cover that very situation. The record is clear that the Secretary of the Interior interpreted this section of the Statehood Act to allow the appellants to continue fishing as they had in the past subject to his regulation."

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[1] So far as we can determine, the great logs and hundreds of yards of wire net which make a fish trap are held under a trust instrument as a security transaction to assist the Secretary of the Interior in collecting in excess of a million dollars he has loaned to appellant corporations. The holding in trust of the implements of fishing (a boat or trap) does not place a "fishing right" or the fishery in trust, nor will the holding in trust of a War Department permit to obstruct navigation by a fish trap accomplish the trust appellants infer. See the affidavit of Samuel G. Johnson, page 46 of transcript prepared by the district court clerk.

> "This interpretation is entitled to great weight in determining what Congress intended by Section 4 if there is any ambiguity in that language. *Fawcus Machine Co.* v. *U.S.*, 282 U.S. 375." (Emphasis added)
>
> (Kake-Angoon, 12; Metlakatla, 14.)

We believe appellants are in error when they state that the Secretary of the Interior interprets § 4 as giving him regulatory authority in the field of commercial fisheries. As we have shown in our Argument I, the Secretary, as required by the Administrative Procedure Act, clearly claims his authority for his regulations as being the White Act and §6(e) of the Statehood Act, not § 4 of the Statehood Act. (See 24 F.R. 2053.) This Court should not unnecessarily speculate as to whether or not in the future any claim to a federal right can be made under § 4. That claim should be litigated only when and if it is ever squarely presented. This section is but a naked tree which may or may not bring forth the fruit which the appellants are so anxious to harvest at this time. As stated by Justice Cardozo in the case of *Gully* v. *First National Bank,* (1936) 299 U.S. 109, 81 L. ed. 70, 57 S. Ct. 96:

> "The most one can say is that a question of federal law is lurking in the background, just as further in the background there lurks a question of constitutional law, the question of state power in our federal form of government."
>
> (Case cited, Metlakatla, 3; Kake-Angoon, 3 and 14.)

Even appellants have not been able to unequivocally claim any right under § 4 of the Statehood Act. For example, appellants state:

> "... is § 4 of the Statehood Act an assumption of permanent jurisdiction (subject to further act of Congress) by the Federal Government over the location and manner of Indian fishing within the States, ..."
>
> (Kake-Angoon, 4; Metlakatla, 5.)

And again the appellants make the point:

> "... that control over the Indian fishery was reserved to the Federal Government *until further act of Congress* ..."
>
> (Kake-Angoon, 8; Metlakatla, 9.)

Appellants again observe:

> "... The decisions of this court in *Manchester* v. *Massachusetts,* 139 U.S. 240, 35 L. ed. 159, and *Skiriotes* v. *Florida,* 313 U.S. 69, in upholding State control of fish and wildlife with special emphasis on the absence of conflicting federal legislation in each instance likewise suggest that this is a field for federal control if Congress elects to enter it."
>
> (Kake-Angoon, 13 and 14; Metlakatla, 15 and 16.)

We cite the foregoing from the appellants' briefs, not because we interpret the cited cases as they do, but because even they recognize that before they have a substantial federal right pursuant to § 4, there must be additional legislation, legislation to which appellants have not directed this Court. Unless § 4 is interpreted as we contend, then, as Justice Brennan observed:

> "... questions would be raised as to its constitutionality under the 'equal footing' doctrine substantially the same as those raised in regard to § 6(e) of the Statehood Act."

(See opinion of Justice Brennan, July 11, 1959, on application for restraining order.)

Constitutional questions should not be resolved on speculative issues in one instance and moot issues in the other.

Article XII, § 12, of the Alaska State Constitution has wording very similar to that of § 4 of the Statehood Act. This has not been discussed at length, for the simple reason that the Constitution of the State is not claimed by appellants to be the basis for a substantial federal question.

We believe the above arguments completely answer Questions 3 and 4 propounded by all the appellants and therefore, together with Argument I, dispose of the Kake-Angoon case, leaving only the special issues unique to Metlakatla.

III.

ALTHOUGH THE APPELLANT METLAKATLA MAY HAVE SOME FUTURE RIGHTS ON WHICH TO PREDICATE A FEDERAL QUESTION PURSUANT TO THE STATUTE SETTING APART CERTAIN LANDS FOR THEM AND A PRESIDENTIAL PROCLAMATION GIVING THEM THE RIGHT TO EXCLUSIVELY FISH IN CERTAIN WATERS, THE FEDERAL RIGHT, IF ANY, INVOLVED IN THIS LITIGATION ARISES OUT OF REGULATIONS ISSUED PURSUANT TO THE WHITE ACT AND SECTION 6(e) OF THE STATEHOOD ACT AND THE ISSUES ARE THEREFORE MOOT.

As we have shown earlier in Argument I, the source of the authority of the Secretary of the Interior for 1959 fishing regulations is § 6(e) of the Statehood Act, making the White Act applicable to Alaska only for the year 1959. The fishing season has terminated for Metlakatla, and they did in fact fish their traps during the fishing season of 1959. Even if the authority contained in § 6(e) were not limited in duration, the 1959

regulation admittedly expire on December 31, 1959. The positive issues involved in this litigation are moot.

We can concede that it is possible, but improbable, that the Secretary of the Interior will attempt by regulation to set aside the Alaska constitutional provisions prohibiting fish traps and the criminal statutes implementing the same after the year 1959. It is improbable because, as we have shown, the authority under which he acted for 1959 will be extinguished January 1, 1960. The Secretary of the Interior has a right, pursuant to Title 48 U.S.C., § 358, to engage in the management and control of the uplands of the Metlakatla reservation. This, of course, does not involve fish traps or fishing rights. Presidential Proclamation No. 1332 of 1916, giving to the Metlakatlan Indians an exclusive right to fish certain waters surrounding their reservation (which proclamation, we believe, is probably destroyed by operation of law by the advent of statehood, but a point we need not decide at this time) provides that the waters are to:

> ". . . be used by them (Metlakatlans) under the *general fisheries laws* and regulations of the United States as administered by the Secretary of Commerce." (now Secretary of the Interior) (Emphasis added)

Therefore, even though the Metlakatlans may be the *only persons* permitted to fish in certain waters, we submit that the Secretary of the Interior will regulate the fishing of these waters by the Metlakatlans (should he enter the field after January 1, 1960) only under *general fisheries laws,* and will not create racial discrimination in the *type of fishing implements to be used.* If the Secretary of the Interior does determine that he has authority under the Metlakatla reserva-

tion statute and the presidential proclamation to specially and specifically permit only the Metlakatla Indians of Alaska to operate constitutionally prohibited fish traps upon the tidelands, submerged lands or inland waters of Alaska, then at that time there will truly be a justiciable controversy involving a federal right which will be substantial in nature and go to the very root of federal/state relationships.[2]

The presidential proclamation concerning these waters states:

> "Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned."

It is to be noted that the State of Alaska has not in this case violated this provision. We have not claimed that the areas of tidelands, submerged lands or inland waters purportedly set aside by the presidential proclamation are open to fishing by *all* persons. We have claimed only that the Metlakatlans in their exclusive right to fish a certain area have no right to violate the organic law of Alaska in the taking of migratory fish, most of which remain in the waters in question for only a few hours to several days. So far as this case is concerned, the Metlakatlans may fish that area exclusively, so long as it is done with lawful gear calculated to conserve a disastrously depleted resource. The

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[2] The problems incident to the presidential proclamation and the statutory reservation as related to fishing are discussed at length in the case of *Alaska Pacific Fisheries* v. *U. S.*, Court of Appeals, Ninth Circuit, 240 F. 274, and this Court, 248 U.S. 78. The proclamation may have been void, and the limits of the statutory reservation undefined. However, for purposes of this brief, we are taking both at face value. The questions are not before the Court if our theory as to the mooted issues is correct.

statement by Judge Kelly, that the Metlakatlans could not fish with unlawful gear, does not destroy their exclusive right to fish in the waters in question. Appellant Metlakatla agrees that the attack on their reservation in the opinion of Judge Kelly was "by inference." (Metlakatla, 6 and 10.) Substantial federal questions are not thusly created.

The appellant Metlakatla argues that the lower court decision inferentially cuts into their reservation by holding that the waters set aside by the presidential proclamation are not Indian country. Although we do not deem this controlling, it is to be noted that the statutory Metlakatla reservation itself has been held not to be Indian country, *U. S.* v. *Booth,* 161 F. Supp. 269. However, here, of course, we are not talking about the statutory Metlakatla reservation as such, but rather waters covering tidelands, submerged lands and inland waters of Alaska, which, by presidential proclamation, the Metlakatlans have the right to fish exclusively under "general" fishing law.

Although Judge Kelly's opinion is thoroughly correct insofar as it pertains to the waters surrounding the Metlakatla reservation, we do not believe that this case properly presents for this Court a substantial federal question (based on an inference at most) due to the fact that these aspects of the case are not essential to the decision, and those issues of the decision which are essential to the holding have been mooted, as above indicated.

CONCLUSION

The issues suggested in this case are important to Alaska and to federal/state relationships generally. The issue of Indian rights, the salmon industry and its

future, and the continued advancement of a once backward people in a pioneer state, are all matters of great consequence. Such questions and other which tread closely upon the heels of this case may well require judicial determination. But appellee urges that questions of such magnitude be not decided in this case or in any case where they are not squarely and properly presented, and certainly not in a case rendered moot by the passage of time.

For the Court's information, the Chief and two Associate Justices of the State Supreme Court have been appointed, and it is expected that the said court will be functioning within thirty days. No information is available which would suggest an answer to the question whether or not the State Supreme Court will review decisions of the interim courts which have constituted Alaska's judicial system since January 3, 1959.

Dated at Juneau, Alaska, this 16th day of September, 1959.

Respectfully submitted,

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